

EXCELSIOR EXPLORATION CORP.

IBLA 88-271

Decided February 14, 1990

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease applications ES-32423 and ES-32424.

Affirmed.

1. Oil and Gas Leases: Known Geologic Structure--Oil and Gas Leases:  
Noncompetitive Leases

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). When BLM determines lands lie within such a structure before issuance of a lease, a noncompetitive lease application for such lands must be rejected.

2. Oil and Gas Leases: Known Geologic Structure--Oil and Gas Leases:  
Noncompetitive Leases

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

APPEARANCES: Leon F. Scully, Jr., Esq., West New York, New Jersey, for appellant; Mary Katherine Ishee, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Excelsior Exploration Corporation (Excelsior) has appealed from the January 6, 1988, decision of the Eastern States Office (ESO), Bureau of Land Management (BLM), rejecting noncompetitive oil and gas lease offers ES-32423 and ES-32424. Excelsior filed these two lease offers on April 5, 1983, for unsurveyed acquired lands situated in the Daniel Boone National Forest, Clay and Leslie Counties, Kentucky.

In Excelsior Exploration Corp., 91 IBLA 76 (1986), the Board vacated a BLM decision dismissing Excelsior's protest of noncompetitive over-the-counter offers ES-31947 and ES-32418, filed by John R. Chitwood and William Moser, respectively. Each of these two lease offers described the same

tracts: 3094Bp (27.30 acres), 3094Bq (149.10 acres), 3094Br (196.50 acres), and 3094Bs (7128.02 acres). Excelsior's offer ES-32423 covered tracts 3094Bp, 3094Bq, and 3094Br, and its offer ES 32424 covered tract 3094Bs. Excelsior protested the Chitwood and Moser offers on the basis that they each violated the 6-mile square limit of 43 CFR 3110.1-3(b). Although the Board ruled that BLM had improperly rejected Excelsior's protest, it remanded the case, stating that "prior to taking any further action BLM should investigate the status of the lands in question." 91 IBLA at 79. Specifically, the Board directed BLM to resolve the following issues:

On August 23, 1985, the Board received a letter from one Richard Counts, Esq., stating that the land involved in this case "is subject to a valid oil and gas lease which has been held by production since 1972." BLM should determine whether this statement is true and, if this land is subject to federal lease, whether or not it must be leased competitively in accordance with 30 U.S.C. § 226(b) (1982). Moreover, a note in case file ES 31947 indicates that coal lease ES 12847 was issued for tracts 3094Bp and 3094Bq effective March 1, 1975, at a time when the coal, oil, and gas rights were in private ownership. [Note omitted].

91 IBLA at 79.

By letter dated October 22, 1986, BLM requested that Counts submit "any and all information which may affect the issuance of lease offers ES 32423 and ES 32424." Counts responded by letter dated November 26, 1986, providing the following information:

The lands included in over the counter lease offerings ES-32423 and ES-32424 comprise a portion of a 73,800 acre lease from Fordson Coal Company (hereinafter the "Fordson Lease") to National Petroleum, Inc. dated the first day of January 1971. This lease provides for a primary term of ten years. Production was obtained from a number of wells thereby perpetuating the lease into its secondary term.

The Fordson Lease was subsequently acquired by my client, Penn Virginia Resources Corporation, (hereinafter, Penn Virginia) in January of 1985 and additional development has taken place. Recognizing that the National Forest Service does own the surface underlying the acreage which you had described in ES-32423 and ES-32424 Penn Virginia would like to cooperate to the fullest extent possible in developing this acreage.

Of further interest to you may be the fact that, even if this acreage was not subject to a valid oil and gas lease, this acreage is within a known geologic structure. This area was drilled as early as the 1920's by United Fuel & Gas Company (subsequently Columbia Gas) and has had significant oil and gas development since that time.

In a follow-up letter, dated February 25, 1987, Counts suggested that he meet with BLM during March, at which meeting he would "provide production records and maps concerning Penn Virginia's lease." The record contains no evidence that such a meeting took place, nor does it contain any production records and maps concerning Penn Virginia's lease. However, the February 25, 1987, letter bears a handwritten note by a BLM employee which states: "Received phone call 4/8/87. Mr. Counts stated they were not going to pursue their claim."

At that point, BLM apparently turned its attention to the question of whether the lands described in Excelsior's two lease offers should be leased competitively. In its January 6, 1988, decision rejecting Excelsior's lease offers, BLM stated in part:

All the trac[t]s included in the offers are within the Clayco Field known geologic structure which was effective September 30, 1987. In accordance with 43 CFR 3110.3(a) [1987] all or part of the lands found within a known geologic structure of [a] producing oil or gas field must be rejected. Therefore, ES 32423 and ES 32424 \* \* \* must be and are hereby rejected.

BLM based its decision upon a mineral report prepared by Kenneth R. Adams, dated September 30, 1987 (Mineral Report), the purpose of which was to "establish the presumptively productive area of the oil & gas fields in Clay County in order to determine if lands in the study area should be placed in a Known Geologic Structure and offered for competitive leasing," and which "was begun at the receipt of lease applications ES-32423 and ES-32424" (Mineral Report at 1). In this report, Adams concluded that the lands described in Excelsior's lease offers "and other Federal mineral interests are structurally a part of the Cincinnati [sic] Arch (The dominate [sic] structural feature) and that this study area is productive or presumptively productive from at least eight (8) formations." Id. Adams supports his conclusion that the lands lie within the Clayco known geologic structure (KGS) with the following information:

The study area lies along the east flank of the Cincinnati Arch, a broad open fold which trends southwest to northeast. The rocks at the surface in the study area are from the Pennsylvanian-Pottsville group. These rocks include several types of sandstones, shales[,] limestones, and coal.

The occurrence of the Petroleum deposits are both structurally and stratigraphically controlled. Drilling success is high in the area due to multiple-producing horizons and modern well-completion techniques.

While production rates are low when compared to fields in Louisiana and Mississippi, gas appears to be ubiquitous. All but a few of the over 500 well records examined in this study, report one or more shows of gas and many report gas and oil shows. The only apparent factors controlling the completion of a well in this area are economic. This observation was confirmed by a telephone

conversation with Mr. Leon Scully an active acquirer of leases in the area. When informed that certain of the lands of which he holds an interest were being studied and in all probability would be placed in KGS status, Mr. Scully stated, that wells drilled in this area had low commercial prospects but "anywhere you drilled in the area you could find some gas ...." The writer allowed that everyone hopes for a commercial well, but paying quantities of petroleum was not a test in making KGS decisions just that the lands in the KGS be productive in part and any lands that are presumptive are included.

The target zones for the petroleum-bearing strata are the Mississippian-Greenbrian Limestone and Price Formation sandstones, the Devonian-aged Chattanooga Shale through the Ordovician-aged Knox Group. These are referred to as the "Big Lime", "Injun-Weir-Berea" sands, the "Devonian[]" shale, [t]he [C]orniferous, and the Knox respectively by local drillers. Drilling depths range to 5,000 feet.

(Mineral Report at 1-2). Adams explains that there have been "15 different KGS classification actions in the study area beginning with the June 22, 1971 classification of the Hell-for-Certain KGS," and that "[t]he classification of the Clayco KGS attempts to bring in and consolidate the new drilling data and the lands affected by past KGS actions \* \* \*." Id. at 2.

In its statement of reasons (SOR), Excelsior asserts that "Clayco is an honest and unpretentious imaginary KGS" (SOR at 2). Excelsior emphasizes that the Mineral Report was initiated by the Jackson District Office (JDO) upon receipt of lease offers ES-32423 and ES-32424, on about January 2 or 3, 1987. According to Excelsior, "[o]ther non-competitive lease applications covering lands lying within Clayco KGS were received by the JDO both before and after this date and routinely clearlisted by that office" (SOR at 3). Moreover, Excelsior argues:

At least four more applications were "clearlisted" in 1987 and leases issued for lands lying within what is now called the "Clayco" KGS. All of this was done after the two Excelsior applications had been received by the JDO for the "clearlisting" process. It is the receipt of these two applications, we are told, which began the KGS study. Excelsior's applications were held nine months at the end of which, September 30, 1987, the "Clayco" KGS was announced and the applications rejected. In the meanwhile the following applications were clearlisted and leases issued covering lands lying within what was soon to be the "Clayco" KGS.

Serial No.	Applicant	Clearlisted	Issued
36490	George E. Howard	2-6-87	3-1-87
36783	Same	3-27-87	4-1-87
36784	Same	5-12-87	6-1-87
37239	Peco Resources, Inc.	7-17-87	8-1-87

(SOR at 3-4). Excelsior questions why these applications for lands "lying within the Clayco KGS [were] clearlisted and issued, while Excelsior's were rejected." Id. at 5. Excelsior maintains that "no geological distinctions between them are made by the JDO." Id.

Excelsior questions the conclusions drawn by BLM from an article written by Michael Birch, 1/ and attached to the Mineral Report as Appendix 1. Excelsior refers to "Sheet 3" of an "Oil and Gas Map of Kentucky" prepared by the Kentucky Geological Survey in arguing that "the Cincinnati Arch is barren of oil and gas production for the 125 miles from Ohio until it meets the Nashville Dome in the counties of Cumberland, Clinton and Wayne adjoining Tennessee" (SOR at 6-7). According to Excelsior, "[t]here is absolutely no reason, nor is any stated, to presume the study area is production from any formation much less 'productive from at least eight (8) formations' which are left unnamed." Id.

In addition, Excelsior maintains that "competitive interest" is a criterion which BLM should consider as a "significant factor" in making a KGS determination, citing Arkla Exploration Corp. v. Texas Oil & Gas Co., 734 F.2d 347, 360 (8th Cir. 1984). In Excelsior's opinion, the JDO should have considered the number of filings for parcels lying within the KGS study area, as well as the number of leases in the study area which terminated before expiration of their primary term. Excelsior claims that BLM "chose to ignore 'competitive interest'" (SOR at 13).

In its answer, counsel for BLM states that "[w]hile appellant correctly points out that the crest of the Cincinnati Arch is not productive, the KGS is not based on production from the Arch; the Arch merely forms a major structural barrier signaling the end of the producing formations" (Answer at 1-2). Further, counsel for BLM states that "well data available to the ESO shows that over 90% of the wells drilled within the boundaries of this KGS had a successful completion rate." Id. at 2.

In addition, the ESO prepared a response to Excelsior's SOR, and BLM submitted this response to the Board as an attachment to its answer. In this response, the ESO sets forth the procedures it followed in defining the acreage of the Clayco KGS. Because Excelsior argues that such procedures were aimed specifically at rejecting its leases, we set forth the ESO's account below:

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1/ In its answer to Excelsior's SOR the ESO provides the following discussion of the Michael Birch's report: "Mr. Michael Birch's report was appended to the KGS Mineral Report because it formed the basis for the Hyden West KGS extension and is a likely scenario for trapping mechanisms in the Big Lime across the lands in Excelsior's applications, there being no data to the contrary. Mr. Birch's report is from the Proceedings of the Technical Sessions, Kentucky Oil and Gas Association's 43rd Annual Meeting June 13-15, 1979 and was published as Kentucky Geological Survey Serial Publication No. 7, Series 11, 1983, pp. 65-82."

On January 5, 1987, the Jackson District Office (JDO) received over-the-counter lease applications KYES 32423 and KYES 32424 so they could undergo the process known as the known geologic structure (KGS) clearlisting. Under the clearlisting process, these applications were given to Ken Adams, the KGS Technical Reviewer for the JDO who is responsible for KGS determinations for Kentucky and eight other States within the jurisdiction of the JDO. When leases are clearlisted by JDO, they are checked first to see if they fall within an existing KGS. If so a memorandum so stating is sent to the Eastern States Office (ESO) Branch of Minerals Adjudication (971) so the application can be rejected. If the application passes this step, it is then scrutinized against the data base existing in-house (snapshot clearlist). Unless there is existing in-house data showing a clear need for further KGS study or other compelling reasons to hold an application, it is then clearlisted as of the date of the memorandum transmitting the application back to ESO. In the case of Excelsior's applications, both criteria for further study were met. First, when Excelsior's applications were received, a note was attached by ESO stating they had information that led them to believe the tracts involved had been in a productive status as late as 1972 \* \* \*. This could not be verified by the data in-house, however, so a data search was initiated. Secondly, it was noted that the easternmost portion of Tract 3094Bs was within the area mapped as the Hyden West KGS and that there were productive wells immediately west of this large tract. Based on current data, this office determined that under the criteria used for the Hyden West KGS, Tract 3094Bs should have been classified as being part of that KGS. This office, therefore, determined that further study of all tracts involved was necessary and the work was then prioritized. The KGS work in the JDO is prioritized on a potential income basis. Thus, work in the States with high activity levels with high potential for income loss to the Federal Government due to non-action get first attention. Historically, the States of Alabama, Arkansas, Louisiana and Mississippi are highest priority in the JDO unless otherwise directed by ESO. Therefore, the Clay County study was conducted on a time available basis.

As noted earlier, this study required a search for data that was not in-house at the time the study began. As the data was received and plotted, it was noted that the previous mapping efforts for this area were inadequate. A new base map was constructed by this office. When this map was completed in late July 1987 (see date of well information on KGS plat submitted by Mr. Scully) all clearlisting in the area stopped and the study area was expanded to encompass all mapped Federal acreage. After reviewing the available well data, it was concluded that the presumptively productive area far exceeded the limits of the study area. Mapping has not been completed to ascertain the full limits of the trap. The study area was bounded on the east by the previous boundary of the Hyden West KGS, on the north by the Oneida-Burning Springs KGS, on the west by the westernmost known Federal

mineral ownership within the Redbird purchase unit and on the south by the southernmost known Federal mineral ownership within the Redbird purchase unit.

[1] Section 17 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 226(b) (1982), provides that "[i]f the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding \* \* \*." See 43 CFR 3100.3-1 (1987); 43 CFR Subpart 3120 (1987) (concerning competitive leases). Courts interpreting this statutory provision have consistently held that, given the restriction to "competitive bidding," the Department has no discretion to issue a noncompetitive oil and gas lease for land situated within a KGS. McDonald v. Clark, 771 F.2d 460, 464 (10th Cir. 1985); McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974).

This Board has stated that when "the determination of the KGS status of lands subject to an oil and gas lease offer is delayed for whatever reason and during that delay the land is determined to be within a KGS, we have affirmed BLM's subsequent rejection of the offer in every case because of the statutory provision on noncompetitive leasing." Wilfred Plomis, 102 IBLA 337, 339 (1988). Such a result is required by Departmental regulation 43 CFR 3110.3 (1987), which provides that "[i]f, prior to the time a noncompetitive lease is issued, all or part of the lands in the offer are found to be within a known geological structure of a producing oil or gas field \* \* \* the offer shall be rejected in whole or in part as to such lands, as appropriate." 2/ See also 43 CFR 3112.5-2(b) (1987).

Excelsior complains that BLM initiated the Clayco KGS study upon receipt of its lease offers, and that BLM delayed action on its offers until that study was completed. As the Board stated in response to similar arguments in Wilfred Plomis, supra at 340, "there is no time limit on BLM's decision to either reject a lease offer or issue a lease." Based upon the record, we cannot conclude that BLM arbitrarily delayed action on Excelsior's lease offers. The response of the ESO to Excelsior's SOR, quoted above, provides adequate justification for the procedures it followed in this case. Having determined that the lands described in Excelsior's lease offers lie within the Clayco KGS, BLM was without authority to issue those leases. 3/

2/ The Federal Onshore Oil and Gas Leasing Reform Act of 1987, P.L. 100-203, 101 Stat. 1330-256 (1987), amended 30 U.S.C. § 226(b)(1) (1982), to provide for an all-competitive leasing procedure for the leasing of Federal oil and gas, with noncompetitive leasing occurring on a limited basis following competitive bidding. Offers pending when that Act was enacted are to be processed under the procedures applicable before it was amended, however. Section 5106(a), P.L. 100-203, 101 Stat. 1330-259 (1987).

3/ Excelsior maintains that after BLM initiated the KGS study involved herein, BLM clearlisted and issued four leases for lands which were a part

[2] An applicant for an oil and gas lease who challenges a determination that certain lands are situated within the KGS of a producing oil and gas field has the burden of showing the determination is in error. Lawrence A. Egan, 104 IBLA 57, 64 (1988); Evelyn D. Ruckstuhl, 85 IBLA 69, 70 (1985); Reed International, 80 IBLA 145 (1984); R. C. Altrogge, 78 IBLA 24 (1983). The burden on appellant is to show by a preponderance of the evidence that the determination is erroneous. See Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984).

The term "known geological structure" is defined as "technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive." 43 CFR 3100.0-5(l) (1987). The Secretary of the Interior has historically delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When such experts make a determination that lands qualify for a KGS, the Secretary is entitled to rely upon their reasoned opinion. Bruce Anderson, 63 IBLA 111, 113 (1982). The Board has held that a KGS determination reflects the existence of a continuous entrapping structure on some part of which there is production, or of numerous related but nevertheless independent stratigraphic as well as structural traps. A KGS designation of certain land may be made on the basis of drill stem tests, not just completed producing wells, which indicate that a reservoir which extends under such land is productive. Thunderbird Oil Corp., 91 IBLA 195 (1986), aff'd sub nom. Planet Corp. v. Hodel, Civ. No. 86-679 HB (D.N.M. May 6, 1987). However, as BLM has noted in the instant case, it is not a guaran-tee that all lands included therein are commercially productive. See, e.g., Lawrence A. Egan, *supra*; Evelyn D. Ruckstuhl, *supra*; Robert G. Lynn, 61 IBLA 153 (1982).

Based upon our review of the record, we conclude that Excelsior has failed to demonstrate that BLM's KGS determination is erroneous. As noted, Excelsior takes issue with certain of the information discussed in the Mineral Report prepared in support of the Clayco KGS determination. However, Excelsior does not introduce any information of its own to refute BLM's Mineral Report or to support its contention that the Clayco KGS determination is in error.

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fn. 3 (continued)

of the Clayco KGS study area. In its response to Excelsior's SOR, BLM states that "[w]hen this [new base] map was completed in late July 1987 \* \* \* all clearlisting in the area stopped and the study area was expanded to encompass all mapped Federal acreage." BLM acted improperly, if, in fact, it issued leases for lands which were being studied for inclusion in a KGS. However, such a fact, if true, does not help Excelsior's case. The fact that BLM might have improperly issued leases for lands which turned out to lie within the Clayco KGS does not mean that BLM should also have issued Excelsior's leases. See Donaldson Creek Mining Co. v. OSMRE, 111 IBLA 289, 298 (1989), and cases cited. As noted above, BLM does not have the discretion to issue a noncompetitive lease for lands which lie within a KGS.



Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Will A. Irwin  
Administrative Judge

I concur:

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R. W. Mullen  
Administrative Judge